Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-309

TOUCHE ROSS & CO.,

Petitioner,

—against—

EDWARD S. REDINGTON, as Trustee for the liquidation of the business of Weis Securities, Inc., and SECURITIES INVESTOR PROTECTION CORPORATION,

Respondents.

SUPPLEMENT TO THE PETITION FOR A WRIT OF CERTIORARI

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Petitioner Touche Ross submits this Supplement to its Petition for a Writ of Certiorari to point out the significance to this case of this Court's very recent grant of certiorari in *Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis* (No. 77-1645), which involves a decision of the Ninth Circuit and raises important issues similar to those raised by Touche Ross' Petition. Certiorari was granted in *Transamerica Mortgage Advisors* on November 6, 1978, *see* 47 U.S.L.W. 3317, subsequent to the filing of Touche Ross' Petition and reply brief herein.

The issue in *Transamerica Mortgage Advisors* is whether a private right of action may be implied under

Section 206 of the Investment Advisers Act of 1940—the same issue involved in *Abrahamson* v. *Fleschner*, 568 F.2d 862 (2d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978), and *Wilson* v. *First Houston Investment Corp.*, 566 F.2d 1235 (5th Cir. 1978), *petition for cert. filed*, 46 U.S.L.W. 3766 (June 1, 1978) (No. 77-1717). The Ninth Circuit in *Transamerica Mortgage Advisors*, 575 F.2d 237 (9th Cir. 1978), held by a 2-1 majority —as did similar 2-1 majorities of the Second Circuit in *Abrahamson* and the Fifth Circuit in *Wilson*—that there was such an implied private right of action.

The grant of certiorari in *Transamerica Mortgage Advisors* is significant here in at least two respects. First, it provides further reasons, in addition to those set forth in Touche Ross' Petition and reply brief, for granting certiorari here. Second, it is clear that this Court's decision in *Transamerica Mortgage Advisors* will have an important bearing on the issues presented by Touche Ross' Petition. Consequently, if the Court is not disposed to grant Touche Ross' Petition at this time so as to permit this case to be considered on the merits concurrently with *Transamerica Mortgage Advisors*, it should not deny certiorari but at most should defer decision on Touche Ross' Petition pending decision in *Transamerica Mortgage Advisors*.

I

The Grant Of Certiorari In *Transamerica Mortgage Advisors* Demonstrates That Certiorari Should Also Be Granted Here

1. *Transamerica Mortgage Advisors* involves important issues similar to those raised here. In both cases, the ultimate issue is the extent to which implied private

rights of action may be judicially created under particular provisions of the federal securities laws—in *Transamerica Mortgage Advisors*, under Section 206 of the Investment Advisers Act, and here, under Section 17 of the 1934 Act. Moreover, in both cases determination of the ultimate issue requires analysis of (a) the limitations imposed upon the implication of private rights of action under the federal securities laws by this Court's decision in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975), and (b) the relevance of the criteria adopted by this Court in *Cort* v. *Ash*, 422 U.S. 66 (1975), and subsequent decisions, for determining whether certain statutes create implied private rights of action.

2. The granting of certiorari here would, in view of the grant of certiorari in *Transamerica Mortgage Advisors*, permit this Court to clarify for the lower federal courts (a) the relevance of the *Cort* v. *Ash* analysis in differing statutory contexts, and (b) whether and what differing factors are to be considered in determining the existence of implied private remedies under statutory provisions which, as in *Transamerica Mortgage Advisors*, provide no express remedy whatsoever and those which, as here, already provide an express but limited private remedy.* These questions are

**Transamerica Mortgage Advisors* involves Section 206 of the Investment Advisers Act, a statute for violations of which *no express private remedy whatsoever* is provided, and as to which the existence of any private remedy depends upon judicial implication. On the other hand, this case involves Section 17 of the 1934 Act, a statute for violations of which Section 18 thereof *already provides an express and limited private remedy*, and as to which any judicially-created implied private remedy would go beyond the express remedy that Congress believed appropriate. The distinction is an important one, since *Cort* v. *Ash* by its own terms limits its analysis to determining "whether a private remedy is implicit in a statute *not expressly providing one*" (emphasis added). 422 U.S. at 78. *See also* Petition, pp. 10-11, 20.

of obvious importance and their relevance is of course not limited to the federal securities laws but extends to any statute allegedly giving rise to implied private rights. Consideration of this case together with *Transamerica Mortgage Advisors* would permit this Court to give comprehensive attention to these questions.

3. The grant of certiorari in *Transamerica Mortgage Advisors* necessarily raises serious questions about the correctness of the decision in *Abrahamson* v. *Fleschner, supra,* since they both involve precisely the same issue and since the majority and dissent in *Transamerica Mortgage Advisors* simply adopted by reference, respectively, the majority and dissenting opinions in *Abrahamson.* In this case, the Court of Appeals majority also expressly relied upon *Abrahamson* (the majority opinion in which was written by Judge Timbers, who also concurred with Judge Lumbard to form the majority here) (9a-10a; *see also* 25a [n. 4]). Consequently, if this Court were to reverse *Transamerica Mortgage Advisors,* it would be clear not only that *Abrahamson* too was wrongly decided, but also that in this case the Court of Appeals majority erred in relying upon *Abrahamson* and thereby erred in its decision.

II

If Touche Ross' Petition Is Not Now To Be Granted, Decision Thereon Should Be Deferred Pending Decision In *Transamerica Mortgage Advisors*

In light of the grant of certiorari in *Transamerica Mortgage Advisors,* this Court—even if it were not disposed to grant certiorari here at this time—should not now deny Touche Ross' Petition. Because of the clearly close relationship of the issues here and in *Transamerica*

Mortgage Advisors, the Court at most should defer decision on Touche Ross' Petition pending disposition of *Transamerica Mortgage Advisors.* After its decision there, and depending upon how that decision affects such pertinent decisions as *Abrahamson* v. *Fleschner,* the Court will be in a better position to determine whether to grant certiorari here or whether to remand to the Court of Appeals for reconsideration in light of the ultimate decision in *Transamerica Mortgage Advisors.*

CONCLUSION

Touche Ross' Petition for a Writ of Certiorari should now be granted. If the Petition is not now granted, decision thereon should be deferred pending decision in *Transamerica Mortgage Advisors.*

November 15, 1978

Respectfully submitted,

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